SUPREME COURT, U. S.

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in the

Supreme Court of the United States

October Term 1972

NO. 73-197

ROBERT R. FRANK, et al.,

Petitioners,

vs.

J. WILLIAM WOLF, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING

Petitioners present their petition for a rehearing of this Court's order dated October 23, 1973, denying the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and in support thereof respectfully show:

GROUNDS FOR REHEARING

The following intervening circumstances of substantial or controlling effect have transpired which would support this Court's consideration to grant rehearing and vacate the order heretofore entered denying the issuance of its writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

As further grounds for this Petition, Petitioner respectfully will direct the Court's consideration to substantial grounds.

A. Intervening Circumstances of Substantial or Controlling Effect Which Have Transpired.

I.

This Honorable Court has heard argument in **Zahn v. International Paper Company,** Case No. 72-888, opinion below 469 F.2d 1033 (CA2 1972). The issues in *Zahn* deal with substantial questions involving the application of jurisdiction of United States District Courts. *Zahn*, if affirmed and held to be in accordance with **Snyder v. Harris,** 394 U.S. 332 (1969), will create a direct conflict, involving proper application of jurisdiction by the federal courts, with **Wolf v. Frank.**[1]

The question in *Zahn, supra,* in connection with accumulation of claims in order to establish jurisdictional amount in a diversity suit, is present in the instant matter. A federal court lacking jurisdiction in the first instance cannot dispose of issues arising under state law, since ancillary or pendent jurisdiction cannot be invoked.

[1]477 F.2d 467 (CA5 1973).

II.

The decision below stands in direct conflict with **Zeller v. Bogue Electric Manufacturing Corporation**, 476 F.2d 795 (CA2 1973), certiorari denied October 16, 1973, Case No. 72-1616 [42 LW 3215, 3226]. The Zeller decision sets forth a requisite degree of proof necessary to be discharged by the plaintiff in Securities Exchange Act litigation.

The degree of proof required below and approved by the decision of the United States Court of Appeals for the Fifth Circuit is in direct conflict with *Zeller, supra.*

III.

In a third decision now under review by this Court, **Landry v. Hemphill, Noyes & Co.**,[2] Case No. 73-276, we find the effect of a violation of Regulation T of the Federal Reserve Board upon the ability of a party to recover.

The indication of this opinion in Landry, supra, as well as **Pearlstein v. Scudder & German**, 429 F.2d 1136 (CA2 1970), seems to indicate a trend is being developed in the United States Courts of Appeals for the First and Second Circuits, which can deny recovery to plaintiffs seeking relief under the Securities Exchange Act of 1934 and Rule 10b-5, where said parties have voluntarily violated the provisions of Regulation T of the Federal Reserve Board. Such violations would effectively void the entire transaction on a basis detrimental to the wrongdoer.

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[2]Decision below, 473 F.2d 365 (CA 1 1973); petition for certiorari filed August 10, 1973 and not acted upon by this Court.

Thus, the opinion below raises the question, can a wrongdoer—one in violation of Regulation T, where the violation has been of his own volition—be afforded a status of litigant to institute a proper class action? If the violation affects the legality of his stockholder status, such a person is not a proper party.

B. Substantial Grounds.

I.

The United States Court of Appeals for the Sixth Circuit has applied the provisions of Rule 23.1,[1] as a matter of law, to preclude a party, whose interests are at a variance with and are antagonistic to those of shareholders or parties entitled to hold stock, from maintaining a derivative suit, since such party cannot fairly, impartially and adequately represent the group in the derivative action. **Nolen v. Shaw-Walker Co.**, 449 F.2d 506, 508 (CA6 1971).

This Honorable Court's denial of the application for the writ of certiorari has not given proper weight to the conflict which the decision has created with *Nolen, supra.* The decision below sanctions a nonregistered dealer and market maker, who has exploited a class of stockholders by his manipulative and deceptive practices upon them, to represent such group in a derivative action.

This Court has not, nor has any Circuit Court of Appeals of the United States, rendered any opinion or

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[1]Rules of Civil Procedure, 28 U.S.C.A.

decision establishing limitations in connection with the application and interpretation of the provisions of this instant rule. It would, therefore, appear that this Honorable Court in the exercise of its supervisory jurisdiction, should take the steps necessary to proscriptively limit the application of federal equity jurisdiction where a cause of action has been instituted by parties who are themselves in violation of the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, Rule 10b-5 and Regulation T of the Federal Reserve Board.

II.

The foregoing problem directly affects the applicability of *pari delicto*—"unclean hands"—defenses and their availability in Securities Exchange Act of 1934 and Rule 10b-5 litigation.

The opinion below maintains that the allowability of such a defense is a discretionary right with the trial court, but it fails to recognize that the Acts of Congress do not grant any discretionary rights per se to the judiciary in connection therewith. Therefore, basic guidelines limiting and utilizing the discretionary right of the trial courts must be established.

Finally, this Honorable Court must at some time make a determination to either limit or extend the principle which it has applied in anti-trust and Securities Act of 1933 litigation, specifically, a *pari delicto* defense will not be permitted under any circumstances, to Securities Exchange Act of 1934 and Rule 10b-5 matters.

Thus, if it was the Congressional intent to prohibit such defenses, there should be a voicing of the clear prohibition. If, on the other hand, such defenses remain discretionary with the trial courts, there should be an enunciation of well-defined areas guiding the trial courts in connection with utilization of their discretion in allowing or disallowing the defense. Until the problem is resolved, the federal judiciary is prone to the voicing of many conflicting theories, to further confuse a situation overburdened by conflict and confusion.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

IRVING MARK WOLFF, P.A.
and FRANK, STRELKOW & GAY
Attorneys for Petitioners

By IRVING M. WOLFF
IRVING M. WOLFF

CERTIFICATE OF GOOD FAITH

I, IRVING M. WOLFF, counsel for the above named Petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

IRVING M. WOLFF
IRVING M. WOLFF

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Rehearing was this 14th day of November, 1973 mailed to HEIMAN and CRARY, Attorneys for Respondents, 1428 Brickell Avenue, Miami, Florida 33131.

IRVING M. WOLFF

IRVING M. WOLFF